IER INSTITUTE FOR ENERGY RESEARCH

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March 31, 2020

National FOIA Office, Attn: Kevin Hill
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460
Via U.S. Mail and Email to: hq.foia@epa.gov

RE: FOIA Request – Certain agency records (Claude Earl Walker)

To whom it may concern:

On behalf of the Institute for Energy Research, recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, please consider the following requests for records. We hereby request:

1. Any email correspondence in sent to or from Walker.claude@Epa.gov or any other email account accessible to Claude Earl Walker and used for government business, which correspondence is dated in from December 1, 2019 through the date you process this request, and which includes any of the following words or terms, whether in the "to:" "from:" "cc:" "bcc:" and/or "Subject" lines: a) Goffman, b) Myers@, c) Schmidt@, d) Exxon, e) Chevron, and/or f) climate.
2. Any records reflecting salary, reimbursement or other payments by EPA to Claude Earl Walker in 2019 or 2020, through the date this request is processed.

We request entire "threads" of which any responsive correspondence is a part, regardless whether any portion falls outside of the above time parameter.

To narrow this request, please consider as **non-responsive** any all-staff or Agency-wide emails.

To narrow this request, please consider as **non-responsive** any electronic correspondence that merely receives or forwards newsletters or press summaries or 'clippings', such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting").

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as **non-responsive**, unless forwarded to or from the named persons with substantive commentary added by the sender.

These search parameters are sufficiently precise in their clear delineation for described correspondence over specific dates sent to or from a specified Agency employee.

We agree to pay up to $200.00 for responsive records in the event the Department denies our fee waiver request detailed, *infra*.

Our request for fee waiver is in the alternative, first for reasons of public interest, and second, on the basis of IER's status as a media outlet.[1] We do not seek the information for a commercial purpose. IER is organized and recognized by the Internal Revenue Service as a

[1] See IER's webpage at https://instituteforenergyresearch.org to view its studies, analysis, YouTube publications and other information relevant to this determination.

501(c)3 educational organization. It has an active publishing function as well as a major effort in broadly disseminating public information, particularly as involves the "climate" agenda, energy and environment policy, and the intersection of these matters with activist lobbies. As such, the requester has no commercial interest possible in these records.

The below clearly demonstrates that:

1. The requested information is of widespread public, media and legislative interest.
2. Requester is a non-profit classified as such by the Internal Revenue Service.
3. Requester does not seek these records for a commercial purpose and has no commercial interest possible in these records.
4. Requester intends to broadly disseminate the information requested, and is a media outlet.

This request is made to inform the public about an issue of great public interest, particularly litigation to impose the "climate" policy agenda and/or work of activsts within government to assist same, that has inarguably been the subject of widespread media and public interest. **IER first seeks waiver of any fees** under FOIA on that basis.

Disclosure of records responsive to this request will contribute "significantly" to public understanding of government operations or activities. 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester").

In the alternative, IER requests waiver of its fees on the basis it is a media outlet.

The Agency must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as IER is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event Department refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting Agency proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...").

Definition of Information Sought/Delivery Standards

As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with the Act's prescribed timelines.

In the interests of expediting the search and processing of this Request, IER is willing to pay fees up to $200.00. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed $200.00. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format, and therefore there should be no photocopying costs (see discussion, *infra*).

We request records on your system, e.g., its backend logs, and do not seek only those

records which survive on an employee's particular machine or account.

We do not demand your Office produce requested information in any particular form, instead **we request records in their native form, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.**[2] The covered information we seek is electronic information, this includes electronic records, and other public information.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (***Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.***)" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your Office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced

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[2] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, and accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

In the context of some government agencies' demonstrated practice of taking the effort to physically print, then poorly scan electronic mail into low-resolution, non-searchable PDF files, we note that production of electronic records necessitates no such additional time, effort or other resources, and no photocopying expense. Any such effort as described is most reasonably viewed as an effort to frustrate the requester's use of the public information.

FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to IER's **requests for fee waiver in the alternative** in detail, infra, and respectfully remind the Agency that IER is a public interest organization as such that, at most, IER can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

The Agency Owes Requester a Reasonable Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). In this situation, there should be no difficulty in finding these documents. While the exact location the documents

are held is unknown to requester, The Agency doubtless knows where to find correspondence of specific, identified employees and is in a position to ascertain whether its employees sent or received correspondence on a particular day.

The Agency Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies. Pursuant to

high-profile and repeated promises and instructions from the previous President and Attorney General we request the Agency err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that the Agency claims any records or portions thereof are exempt under any of FOIA's discretionary exemptions, we request you exercise that discretion and release them consistent with statements by the immediate-past President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama, January 21, 2009), and "Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested record(s) may be exempt from disclosure, please inform us of the basis of any partial denials or redactions, and provide the rest of the record, all reasonably segregable, non-exempt information, withholding only that information that is properly exempt under one of FOIA's nine exemptions. *See* 5 U.S.C. §552(b). We remind the Agency that it cannot withhold entire documents rather than producing their "factual content" and redacting any information that is legally withheld under FOIA exemptions. As the D.C. Circuit Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). **As an**

example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (that is "who, what, when" information, e.g., To, From, Date, and typically Subject) is not "deliberative".

If it is your position that a document contains non-exempt segments and that those nonexempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. See *Mead Data Central v. Department of the Air Force*, 455 F. 2d 242, 261. Further, we request that you provide us with an index of all such withheld documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959(D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a Vaughn index. If a record is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please provide responsive documents in complete form. Any burden on the Agency will be lessened if it produces responsive records without redactions and in complete form.

Requests for Fee Waiver in the Alternative

This extended fee waiver discussion is detailed as a result of our experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are,

apparently, unwelcome. *It is only relevant if the Agency considers denying our fee waiver request.*

Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.

IER's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester").

IER does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, IER is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).